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Harriet E. Rippentrop v. Minnie G. Pickering : Brief of Respondent

Utah Supreme Court

Edward F. Richards; Gustin, Richards & Mattson; Attorneys for Respondent;
Miltn A. Oman; Attorney for Appellant;

IN THE SUPREME COURT
OF THE
STATE OF UTAH

HARRIET E. RIPPENTROP,

Plaintiff and Appellant,

vs.

MINNIE G. PICKERING,

Defendant and Respondent.

Case No. 9896

BRIEF OF RESPONDENT

Appeal from the Judgment of the Third Judicial
District Court for Salt Lake County
Honorable Merrill C. Faux, *Judge*

EDWARD F. RICHARDS
GUSTIN, RICHARDS &
MATTSSON
1007 Walker Bank Building
Salt Lake City 11, Utah
Attorneys for Respondent

MILTON A. OMAN
1105 Continental Bank Building
Salt Lake City, Utah
Attorney for Appellant

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CASES CITED

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—vs.—

MINNIE G. PICKERING,
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BRIEF OF RESPONDENT

The parties will be referred to as in the case below.

STATEMENT OF THE KIND OF CASE

Plaintiff seeks to establish a right of way over defendant's property claiming an adverse user for a period of more than twenty years (Pretrial Order, R. 14).

DISPOSITION IN LOWER COURT

At the close of plaintiff's case defendant moved

for a dismissal (R. 86-87). The motion was provisionally denied (R. 88). At the close of all of the evidence both plaintiff and defendant moved for a directed verdict. The court thereupon granted defendant's original motion of dismissal and discharged the jury (R. 132). Findings of fact, conclusions of law and a judgment of dismissal were thereafter duly made and entered (R. 17-21).

RELIEF SOUGHT ON APPEAL

Defendant, the respondent, defends the action of the court below, which appellant, the plaintiff, seeks to reverse.

STATEMENT OF FACTS

Appellant's statement of facts does not present the true setting of the case and in certain instances, hereinafter to be pointed out, is in direct conflict with the proceedings in the court below. We are impelled to restate the position of the parties.

Mrs. Rippentrop is purchasing from Keren Skidmore Wilde under a uniform real estate contract dated October 6, 1959 (Ex. 15 P) property located at 241 South Ninth East Street in Salt Lake City, described as follows:

> Commencing at the Northwest corner of Lot 4, Block 43, Plat "B", Salt Lake City Survey, and running *thence South 26¼ feet;* thence East 7½ rods; thence North 26¼ feet; thence West 7½ rods to the place of beginning.

Mrs. Pickering and Irene B. Schlegel are joint tenants in the ownership of the property immediately to

the South at what is commonly known as 251 South Ninth East Street, Salt Lake City, and particularly described as follows:

> *Beginning* at a point *26.25 feet South* from the Northwest corner of Lot 4, Block 43, Plat "B", Salt Lake City Survey, and running *thence South 41.25 feet;* thence East 123.75 feet; thence North 41.25 feet; thence West 123.75 feet to the point of beginning. (Entry 34, Abstract of title, Ex. 16 D).

Samuel R. Skidmore was the common owner, having acquired the larger tract by deed recorded June 6, 1882 (Entry 3, Abstract of Title, Ex. 3 P). The North 25 feet were conveyed by Samuel R. Skidmore to S. Randolph Skidmore by deed recorded June 24, 1892 (Entry 5, Abstract of Title, Er. 3 P), the description of the property being as follows:

> Beginning at the Northwest corner of Lot 4 Block 43 Plat "B" Salt Lake City Survey, thence East 7½ rods, *thence South 25 feet,* thence West 7½ rods, thence North 25 feet to the place of beginning.

Samuel R. Skidmore conveyed the South 41¼ feet, the property now owned by Minnie G. Pickering and Irene P. Schlegel, to Mrs. May Pickering by deed dated September 23, 1909 (Entry 8, Abstract of Title, Ex. 16 D). On the same day, September 23, 1909, Samuel R. Skidmore conveyed the strip of land 1¼ feet in width between the two properties as above described to S. Randolph Skidmore by warranty deed (Entry 17, Abstract of Title, Ex. 3 P), thus accounting for the frontage

of 26¼ feet on the Rippentrop side of the title and making that property immediately adjacent and contiguous to the North line of the Pickering property which otherwise would have been separated by a strip of land 1¼ feet in width. The description reads:

> *Beginning* at a point *25 feet South* of the Northwest corner of Lot 4, Block 43, Plat "B", Salt Lake City Survey, running *thence South 1¼ feet;* thence East 7½ rods; thence North 1¼ feet; thence West 7½ rods to the place of beginning.

Exhibit 17 D shows the eaves of the Rippentrop residence to extend out approximately 1¼ feet on the South side next to the Pickering property. The deed conveying the 1¼ feet strip takes care of the encroachment of the eaves over the property conveyed to Mrs. May Pickering on the same day. The home now owned by Minnie G. Pickering and Irene P. Schlegel was constructed in 1913 (R. 34). The home now claimed by Mrs. Rippentrop was constructed before 1893 (R. 33).

Mrs. May Pickering, the first wife of Alexander Pickering, was a daughter of her grantor, Samuel R. Skidmore. Mrs. Wilde was born in the home of her father, S. Randolph Skidmore in 1893 (R. 33) and resided in the family home at 241 South Ninth East until September of 1924 (R. 62), but her parents, Mr. and Mrs. S. Randolph Skidmore continued to reside there until 1946 (R. 37). In the meantime May Skidmore was occupying the house next door with her husband Alexander Pickering and she remained there at least through 1925 (R. 63).

The abstract of title covering the Rippentrop property (Ex. 3 P) discloses that Samuel Randloph Skidmore, also known as S. Randolph Skidmore, remained the owner of the so-called Rippentrop property until his death on October 19, 1956. The decree of distribution dated June 12, 1957, and recorded the next day, distributes the property in undivided interests to Leslie R. Skidmore, son, and Keren Skidmore Wilde, daughter (Entry 25-28, Abstract of Title, Ex. 3 P). On June 18, 1957, Leslie R. Skidmore conveyed the property to his sister, Keren Skidmore Wilde, who remains the owner of the property subject to the uniform real estate contract in favor of Mrs. Rippentrop (Entry 29, Abstract of Title, Ex. 3 P).

The decree of distribution in the estate of S. Randolph Skidmore, in distributing the property now being purchased by Mrs. Rippentrop, makes no reference to the alleyway which, as shown by the surveyor's plat Exhibit 17 D, is wholly on the Pickering and Schlegel property with a distance of 1.5 feet between the brick house claimed by Mrs. Rippentrop and the North line of the Pickering et al. property. On the West there is a distance of a fraction of a foot (0.1) and on the East another fraction of a foot (0.4) between defendant's property and the overhanging eaves on the Rippentrop home. The driveway is approximately 10 feet 4 inches in width between the two houses (R. 72) which leaves defendant with approximately 31 feet out of the total frontage of 41¼ feet for her home and side yard on the South.

The expression in appellant's brief in the last paragraph on page 6 to the effect that the father (Samuel R. Skidmore) deeded an extra strip to his son to extend "to the center of this driveway" is a misstatement of fact. The Senior Skidmore gave the son Randolph two deeds. The first calls for a frontage on Ninth East of 25 feet commencing at the Northwest corner of Lot 4. The second one on the same date as the deed to the daughter, Mrs. May Pickering, calls for a frontage of 1¼ feet on Ninth East beginning at a point 25 feet South of the Northwest corner of Lot 4. This same type of confusion permeates appellant's statement of facts.

The statement in the last paragraph on page 7 of appellant's brief to the effect that there was an accepted property line North of appellant's property 26¼ feet "North of the center of the driveway" and that the "center line of the driveway was likewise accepted and acquiesced in as the property line between appellant's and defendant's properties until respondent built the fence last fall" is equally reprehensible. The record shows that the offer and any testimony on such a theory was expressly rejected by the trial court (R. 45-54).

The defendant, Minnie G. Pickering, is the second wife of Alexander Pickering, whose first wife was May Skidmore (Entry 12-13, Abstract of Title, Ex. 16 D and R. 49). The relationship between the Skidmores was a friendly one (R. 64) and the friendly relationship apparently continued between the parties in the instant action until one of Mrs. Rippentrop's tenants received a letter

warning them against using the driveway (R. 105). Two girls, tenants of Mrs. Rippentrop, precipitated the feeling between plaintiff and defendant in recent years (R. 98-99, 102-103).

When plaintiff's case in chief was concluded there was no evidence before the court to indicate where the driveway was with respect to the theoretical description of the properties claimed by the respective parties. Counsel for appellant indicated the contention that plaintiff was entitled to recover "regardless of whether it is located on our property or on the property of Mrs. Pickering" (R. 106-108).

At the close of all of the testimony the trial court made the following observation:

> The case originally started out, according to the blueprint given this Court, or this division of the Court by the pretrial order, as an action only to establish a right-of-way. The facts show that originally all of the land was owned by Mrs. Wilde's grandfather, Samuel R. Skidmore. From Exhibit 2-P, which shows the Rippentrop home, I will conclude that, at that time, the son used his father's land. If this is a driveway to the south of the house, there certainly was no hostility between father and son for the use of the father's land. Mrs. Wilde's testimony shows a friendly relationship; the former Mrs. Pickering was her Aunt Mae. They visited between families. She came frequently, she said. The title to the Rippentrop home remained in Mrs. Wilde's father until 1957, when title passed to Mrs. Wilde and her brothers by a decree of this Court. Up to the

time of the close of plaintiff's case there was no showing whatever of title to the ground in either of these properties. In order to establish a right-of-way, a person must admit that the title to the ground is in somebody else because he need not make a claim of easement over his own ground. He has all the elements of ownership in his own ground. Accordingly, there was nothing before this Court at the close of plaintiff's case to make a determination of easement.

Now, in this case, it seems that plaintiff is beyond the pleadings, beyond the pretrial order, particularly, asking the Court, not only to determine the boundary line by acquiescence, but to create an entirely new estate—a tenancy in common—between these parties on an area between the houses, undefined as to width or as to length, and to establish as a tenancy-in-common such an area. This Court thinks that even with the many patches on Joseph's coat, that we should not put—attempt to put a patch on as is asked in this case, of establishing a new property interest, a tenancy-in-common of an undefined area, by width or length, and set it up as owned by the present owners of the Pickering and Rippentrop properties. (R. 130-132).

Defendant in her motion for a directed verdict asserted that there was no evidence of adverse use for a period of twenty years or more and that Mrs. Pickering's daughter (Irene P. Schlegel) is a necessary party (R. 127).

ARGUMENT

POINT I.

THERE IS NO EVIDENCE TO SHOW THAT AN OPEN, ADVERSE AND HOSTILE USE OF THE DRIVEWAY FOR A PERIOD OF TWENTY YEARS OR MORE.

There must be evidence to show an adverse use before there is any presumption in that regard, as the presumption of adversity will not arise under a mere use by a licensee and knowledge of such use on the part of a licensor.

In *Lunt et al. v. Kitchens et al.* (1953), 123 Utah 488, 260 P.2d 535, the facts are almost identical with the facts in the instant case. In the *Lunt* case defendants claim the right of way by use for more than twenty years. The evidence shows the two families, Weidners and Kitchens, lived in accord and complete harmony. There were never any objections to the use of the driveway by the Kitchens for delivery of coal and wood to the coal shed on the East side of their property, for parking their cars and for foot passengers. The Weidners also used the driveway although probably to a lesser extent since their family was smaller. This Court stated:

> "In other words, the presumption of adversity will not arise under mere use by a licensee and knowledge of such use on the part of the licensor. Yeager v. Woodruff, 17 Utah 361, 53 P. 1045. The use cannot be adverse when it rests upon license or mere neighborly accommodation. Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070. Sdrales v. Rondos, 116 Utah 288, 209 P.2d 562.
>
> The failure of the Weidners to object to the use of their property by the Kitchenses in the case at hand must have been because of an implied consent in order to accommodate their neighbors. The use by the Kitchenses added no burden to the driveway; they did not attempt to widen it,

> nor to interfere with the use by the Weidners. Where a person opens the way for use of his own premises and another uses it without interfering with the landowner's use or causing him damage, the presumption is that the use was permissive and in absence of proof to the contrary, the person so using it does not acquire a right of way by prescription. Harkness v. Woodmansee (7 Utah 227, 26 P. 291); Cache Valley Banking Company v. Cache County Poultry Growers Association (116 Utah 258, 209 P.2d 251. Since the use is presumed to have been with consent in 1920, unless respondents in the present case have presented sufficient evidence to show that it became adverse and that *the claim of use against permission was known to the Weidners,* the decree of the lower court must be reversed." (Emphasis added.)

In the present case, from 1882 until 1946, the ground on which the driveway is now located was used successively by the father, Samuel R. Skidmore, his son, S. Randolph Skidmore, the daughter and sister, Mrs. May Pickering, Guy L. Wilton, a tenant of Alexander Pickering, the husband of May Pickering and Minnie G. Pickering, the respondent.

The evidence further shows that all of these parties lived in harmony with each other, were very friendly and had no disputes or arguments in connection with the use of the driveway.

Savage v. Nielsen (1948), 114 Utah 22, 197 P.2d 117, makes the following statement:

"It is apparent from this testimony that the use began as permissive use and was used in ackowledgment of a superior right and title first in the father, Albert Savage, and later in the brother, Gordon Savage. In short then, the facts have put this case within the rule set out in Jensen v. Gerrard, supra, where it was said (85 Utah 481, 39 P.2d 1073):

> 'A twenty-year use alone of a way is not sufficient to establish an easement. Mere use of a roadway opened by a landowner for his own purposes will be presumed permissive. An antogoaistic or adverse use of a way cannot spring from a permissive use. A prescriptive title must be acquired adversely. It cannot be adverse when it rests upon a license or mere neighborly accommodation. Adverse user is the anti-thesis of permissive user. If the use is accompanied by any recognition in express terms or by implication of a right in the landowner to stop such use now or at some time in the future, the use is not adverse.' See also: Reese Howell Co. v. Brown, 48 Utah 142, 158 P. 684."

The case of *Zollinger v. Frank* (1946), 110 Utah 514, 175 P. 2d 714, cited by appellant, is distinguishable from the case at bar. In the *Zollinger* case a bridge across the irrigation ditch on the road caved in necessitating the removal and replacement thereof. The son of the landowner removed the broken bridge and immediately notified Mr. Zollinger of his action. Zollinger replaced the bridge at his own expense, which fact the Court

points out clearly showed that Zollinger claimed an adverse right to the owner.

In the present case there is no evidence that any of the Skidmores, including Mrs. Wilde and Mrs. May Pickering or those taking title from them, ever repaired or made any improvements on the driveway or paid any costs of maintaining the same.

Buckley v. Cox (1952), 122 Utah 151, 247 P.2d 277, states the rule covering the burden of proof as follows:

> "A presumption well established in this state is that where a person opens a way for the use of his own premises, and another person also uses it without causing damage, in the absence of evidence to the contrary, such use by the latter is permissive, and not under a claim of right. Jensen v. Gerrard, supra; Savage v. Nielsen, 114 Utah 22, 197 P.2d 117; Cache Valley Banking Co. v. Cache County Poultry Growers Ass'n, Utah 209 P.2d 251; Sdrales v. Rondos, Utah, 209 P.2d 562."

We deem it unnecessary to analyze and distinguish the cases from other jurisdictions and the texts cited by appellant as the cases from our own Court above fully cover the points herein involved.

The pleadings in the case, pretrial order and the evidence do not raise the question of abandonment as argued under point II in appellant's brief. All other facets of the argument under that point have been answered above. It is decidedly clear that appellant has failed to prove an adverse user for a period of twenty

years, and that the lower court was justified in granting a motion of dismissal.

POINT II.

PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE AN INDISPENSABLE PARTY IS NOT BEFORE THE COURT.

In 1955 Irene P. Schlegel became a joint tenant with full rights of survivorship with her mother, Minnie G. Pickering. This made her an indispensable party to this action. An indispensable party is defined in the case of *Lumbermen's Mutual Casualty Company v. Egbert,* 348 U.S. 48, 99 L. ed. 59, 75 S. Ct. 151:

> "In Shields v. Barrow (US) 17 How 130, 139, 15 L ed 158, 160, indispensable parties were defined as 'Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'"

Other authorities on the general subject are: *Gramatan-Sullivan, Inc. v. Koslow* (2 Cir. 1957), 240 F.2d 523, *Clacote v. Texas Pac. Coal & Oil Co.* (5 Cir. 1946), 157 F.2d 216, and *Keegan v. Humble Oil & Refining Co.* (5 Cir. 1946), 155 F.2d 971.

CONCLUSION

The lower court was exceedingly patient in permitting plaintiff every latitude, but of necessity and in ac-

cordance with well-known procedural requirements called a halt to efforts to convert the action into one of boundary dispute, oral and self-serving statements contradicting written muniments of title and other matters beyond the most liberal concept of the pretrial order. Plaintiff was given every opportunity to determine title and possessory rights prior to entering into the real estate contract with Mrs. Wilde (R. 84-85). Simple land measurements would have disclosed her South boundary as being 26¼ feet South of the Northwest corner of Lot 4. An inquiry could have been made of Mrs. Pickering concerning the driveway as an incident to plaintiff's transaction with Mrs. Wilde. Plaintiff neglected these matters. Plaintiff was not misled by the defendant and there are no equities in her favor.

The evidence is not of the nature and character sufficient to deprive Mrs. Pickering of the full use and exclusive benefit of her property. Mrs. Rippentrop cannot expect something for nothing. One cannot be lightly deprived of full enjoyment and ownership of property legally in his or her name. Plaintiff's coercive measures through the instant action should fail. It must be left to the future to determine whether on a neighborly basis there can be some permissive use.

The judgment appealed from should be affirmed with costs to respondent.

Respectfully submitted,

EDWARD F. RICHARDS
GUSTIN, RICHARDS &
MATTSSON
1007 Walker Bank Building
Attorneys for Respondent
Salt Lake City 11, Utah